Supreme Court, U. S.
FILED
NOV 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-706

ARBRY McCULLEY, Administrator of the Estate of Booker Clemons, Deceased,

Petitioner,

vs.

MITSUI O.S.K. LINES, LTD. and BABA-DAIKO SHOSEN, K.K.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit [Docket No. 78-1812] and decided on April 16, 1979 is reported at 596 F.2d 746, is reproduced verbatim at p. 1a of the appendix.

There is no opinion of the district court.

JURISDICTION

Jurisdiction of this appeal is based on Title 28 U.S.C. § 1254(1).

The judgment appealed from was entered on April 16, 1979. A copy of the order is set forth at p. 12a of the appendix.

A petition for rehearing was denied on July 3, 1979. A copy of that order is set forth at p. 13a of the appendix.

One application for extension of time was filed by petitioner, and leave was granted by Mr. Justice Stevens on September 21, 1979 to and including November 1, 1979 to file the instant petition for a writ of certiorari.

QUESTIONS PRESENTED

I. Is the stevedore's negligence in a third party action under § 905 of the Longshoremen's and Harbor Workers' Compensation Act a bar to plaintiff's recovery since the enactment of the 1972 Amendments, where there was evidence at trial that the vessel's crew had created the condition which caused the plaintiff's injuries,

and, if not,

II. Did the Court of Appeals erroneously enter a judgment notwithstanding the verdict for defendant on the ground there was *no* negligence which could be attributed to the vessel or its crew under the standards applicable since the abolition of the unseaworthiness doctrine in a longshoreman's action?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

Title 33 U.S.C. §§ 905 (a) and (b)
[Longshoremen's And Harbor Workers' Compensation Act]

§ 905. Exclusiveness of liability.

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in pro-

viding stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426; Oct. 27, 1972, Pub.L. 92-576, § 18(a), 86 Stat. 1263.

Title 29 C.F.R. § 1918.2,
[Occupational Safety And Health Regulations]

§ 1918.2 Scope and responsibility.

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in § 1918.3(c).

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

Constitution Of The United States
Amendment VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Petitioner's decedent*, a longshoreman, brought suit for personal injuries sustained by him while employed by Transoceanic Terminals Corporation to perform stevedoring services aboard the M/V Mayasan Maru owned by Respondent Mitsui O. S. K. Lines, Ltd., and chartered by Respondent Baba-Daiko Shosen, K. K. Jurisdiction in the district court was based on diversity of citizenship, 28 U. S. C. § 1332 and concurrently on claims cognizable in admiralty, 28 U. S. C. § 1333.

The accident giving rise to this suit occurred on November 23, 1976 a few minutes past 7:00 p.m. Petitioner had been assigned by his employer to work in Hatch #4 of the M/V Mayasan Maru. There are four deep tanks in Hatch #4, the aft pair designated as A (port) and D (starboard) and the forward pair designated as B (port) and C (starboard). Petitioner was assigned to work in deep tank A. [Plaintiff's demonstrative exhibit 27, at trial]

During the afternoon of November 23, 1976, the longshoremen were discharging bales of wire from deep tanks A and D. Deep tanks B and C were empty. Not having completed the discharge of the cargo in deep tanks A and D at 6:00 p.m., the longshoremen, including Petitioner, were told to take a one hour dinner break and return at 7:00 p.m.

About 4:30 p.m. the stevedoring company's hatch boss, Mr. Albert Johnson, requested the duty officer of the

* Booker Clemons, the plaintiff below, died on June 21, 1979 and Arby McCulley was appointed Administrator of his estate. All references herein to "Petitioner" are to Booker Clemons, deceased.

vessel's crew to open the forward deep tanks so they could be worked *after* the supper break, *and after about 30-45 minutes more of unloading was completed in the aft tanks*. The crew opened the deep tanks during the supper break between 6 and 7 p.m. and did not rig any safety lines or net around the open, unguarded 20 × 20 foot tanks in the bottom of the lower hold. Johnson testified it would have taken about three to five minutes to rig the line or net. Defendant never seriouly disputed that the crew opened the tanks. Indeed, its own witness, the stevedoring company's general manager, Paul Lopes, testified that if the longshoremen had opened the tanks it would have been reflected in the stevedore's records showing the vessel was charged for the service performed, but it had not been.

The evidence adduced at trial showed conclusively a custom that the crew rigs such ropes, guardrails or safety net around a deep tank which it is responsible for opening if no cargo is actually being loaded or unloaded. There was testimony that, if the stevedore opens the deep tanks, then it is charged with the responsibility of rigging the safety line or net. No argument was made at the trial by defendant-respondent that the safety custom was a local "Chicago Port custom", nor was any objection made at the trial that it was anything but an industry-wide custom as plaintiff contended.

Upon his return from dinner. petitioner climbed down the ladders from the top deck to the lower 'tween deck on his way back to deep tank A. He paused to check the progress of the men working in deep tank D by bending over and peering into the hold. Upon straightening up, he took a step backward for balance and fell backwards into the unguarded deep tank C, sustaining the injuries for which suit was brought.

The trial court instructed the jury on the standard of care owed to a longshoreman by a vessel. No objection to this instruction was interposed on behalf of Respondents. Indeed, both at the trial level and in the court of appeals, Respondent conceded that the standard of care instruction was proper. The jury was instructed that if the negligence of the plaintiff, the stevedoring company or any of its employees was the sole—the only—proximate cause of the accident then the plaintiff could not recover. [Transcript p. 666, accord Devitt & Blackmar, F. J. P., 3rd Ed. § 96.38]. The jury was also charged in accordance with F. J. P., 3rd Ed. § 96.41 that negligence of the Plaintiff's employer or fellow employees is not imputed to him. [Transcript pp. 667-8]. The case was submitted to the jury on a special verdict which found that Respondents were negligent, that this negligence proximately caused Petitioner's injuries and the Petitioner was contributorily negligent, apportioning his negligence at thirteen per cent (13%). The jury thus returned a verdict (without reduction for contributory negligence) for Petitioner in the amount of $322,000.00. Judgment was entered thereon on March 22, 1978.

Respondents then filed motions for judgment n.o.v. or for a new trial on the ground, *inter alia*, that the evidence was insufficient as a matter of law to sustain the jury's finding of negligence. Defendant also raised, for the first time, in his post-trial motion that the custom of rigging the safety line or net was a "local Chicago Port custom." These motions were denied by the trial court and Respondents perfected an appeal to the United States Court of Appeals for the Seventh Circuit. That court reversed the judgment of the trial court, with directions that "a new judgment" be entered for Respondents on the ground that a reasonable

jury could not find Respondents negligent "in the context of the 1972 amendments to the LHWCA." [p. 4a] Without any evidence in the trial record that the custom of rigging the net or line was esoteric or peculiar to Chicago, a panel of the Seventh Circuit accepted respondent's belated theory, and used as a supporting reason for reversal that liability could not be imposed on the vessel unless there was "evidence that the defendants were aware of or should have been aware of the local custom . . . [or] . . . evidence that in the circumstances the failure to rig a line was a departure from the alleged custom." [p. 10a].

On these facts, a panel of the Seventh Circuit Court of Appeals found "the behavior of the Stevedore belies *any possible inference* that the ship's crew was negligent." [p. 10a]. [emphasis added]. It also held "we firmly conclude that the evidence is of insufficient probative value for jurors fairly and impartially to differ as to the inferences to be reasonably drawn . . . whether . . . *any negligence* could be attributed to these defendants." [p. 4a] [emphasis added]. Finally, in footnote 9 of its opinion [p. 6a] the panel of the Seventh Circuit held ". . . there was no evidence from which the jury could have properly concluded that the vessel's crew was negligent." [p. 6a].

REASONS WHY THE WRIT SHOULD BE GRANTED

The federal law of negligence under § 905 of the Longshoremen's and Harbor Workers' Compensation Act is not settled. If the opinion of the Seventh Circuit is allowed to stand it will frequently be cited as a poor precedent for finding a negligent vessel not liable virtually each time a longshoreman falls into an open, unguarded hatch or tank. This will thwart the Congressional purpose of the 1972 Amendments and Congress' intent that nothing in the amendments was intended "to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." Here, the panel of the Seventh Circuit, per curiam, made glaringly erroneous assumptions, findings of fact and conclusions of law which defy even the most conservative circuits which have strictly applied §§ 343 and 343A of the Restatement of the Law, Torts, 2d, as the correct standard of care in a post-1972 claim.

Even a cursory reading of the per curiam opinion shows the effort the panel is exerting to search for a reason to reverse the plaintiff's verdict, when it is clear that the court below does not even understand when a prima facie case has been made out under the maritime law. Although the court held the plaintiff could not recover under the facts proved under the principles applicable to the 1972 Amendments, the court never once mentioned that the standard of care was not in issue, as the parties submitted the case on an agreed instruction in accordance with the §§ 343 and 343A approach which most of the circuits have applied in these cases, until recently.

Petitioner submits that, should the writ issue in the instant cause, the Supreme Court could pronounce that there is not necessarily one single correct standard of care under the 1972 Amendments to the LHWCA, but, rather, there should be established a general federal maritime law determined on a case by case basis. There may well be cases where, as here, the §§ 343-343A standard instructed to the jury would produce the same result if a pure "reasonable care under the circumstances" standard were applied. Petitioner asserts there may be more than one true standard which can be established to reconcile the opinions in the various circuits, and the instant case is one which can be justified as imposing liability on the vessel for negligence under any already recognized theory of liability, since the enactment of the 1972 Amendments to the Act. The Supreme Court is ready to hear a case involving the standard of ca e, after eight years of conflicts in the circuits.

By granting the writ, the Supreme Court will now come to grips with the issue whether §§ 343 and 343A of the Restatement of the Law, Torts, 2d, smuggles into admiralty law the expressly forbidden element of contributory negligence and assumption of risk as a bar to plaintiff's recovery. If the petition for a writ of certiorari is granted in this case, a reversal of the Court of Appeals for the Seventh Circuit is almost certain, and these questions will be resolved for many cases in the future, avoiding much more obfuscation for trial and appellate courts in this recurring problem which is not likely to heal itself.

I. This court should settle the law under § 905(a) and (b) of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act whether contributory negligence of a longshoreman and his employer should be a complete bar to a plaintiff's recovery, where a trial court and jury find negligence on the vessel's part in creating the condition which causes a plaintiff's injury.

II. The opinion of the Seventh Circuit is in direct conflict with the opinion of the Ninth Circuit which is presently before the Supreme Court on petition for writ of certiorari, [*Bachtel v. Mammouth Bulk Carriers, Ltd.* No. 79-538], and the opinions of the Second, Third, and Fifth Circuits.

III. The Seventh Circuit has decided an important question of federal law which dehors the general trend of decisions in longshoremen's actions since the 1972 Amendments to the LHWCA, and redecided the facts to reach a conclusion contrary to the trial court's and jury's, unduly narrowing what constitutes "negligence" within the meaning of a post-1972 claim for personal injuries, which decision could affect an inordinately large number of cases in the future.

ARGUMENT

Most of the courts which have considered longshoremen's actions for personal injuries since the 1972 Amendments to the LHWCA have held the vessel liable where the crew participated in creating the condition causing injury to the longshoreman, or where the vessel knew or should have known of an unreasonably dangerous condition which was likely to cause the injury complained of. The word "negligence" is not defined in § 905.

The Seventh Circuit Court of Appeals has disregarded a jury's special verdict that there was negligence on the vessel's part, and entered a judgment for defendant notwithstanding the verdict for plaintiff in the amount of $322,000.00. Many longshoremen will be adversely affected by this anomalous ruling because the vessel owners will endeavor to cite *Clemons* every time a longshoreman falls into an open, unguarded hatch for the proposition that such a condition is open and obvious as a matter of law. A mere reading of the opinion of the court of appeals indicates how the panel of the Seventh Circuit apparently searched the record for reasons to reverse, and how it apparently misapprehended the basic body of law developed after 1972.

The conflict centers about erroneously adopted notions of the Seventh Circuit that there is language in the LHWCA and the Congressional Committee Reports of the 1972 Amendments to the Act that the "stevedore is statutorily charged with the primary responsibility of the safety of the longshoreman," despite the fact that nowhere is such a simplistic formula found in the Act, the OSHA regulation or the Congressional Reports of the Senate and House Committees.

The Seventh Circuit in its opinion [p. 10a] unequivocally decides "The Stevedore [sic], statutorily charged with the primary responsibility for its employees, did not ask the ship's crew to rig a safety line at the time it requested . . . the tanks . . . to be opened or after plaintiff's accident." There is not one word in the LHWCA or in the House or Senate Committee Report Notes which defines the vessel's or the stevedore's responsibility as primary. Indeed, the advice of the House and Senate Reports is to the contrary, i.e.: ". . . Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." [Senate Report of the Labor and Public Welfare Committee, No. 92-1125, September 14, 1972].

The United States Court of Appeals for the Ninth Circuit has recently decided *Santos v. Scindia Steam Navigation Company*, 598 F.2d 480 and *Bachtel v. Mammouth Bulk Carriers, Ltd.*, ... F.2d ....., (C.A., 9th Cir.), Aug. 20, 1979, No. 77-3645. In those cases, the Ninth Circuit held that a vessel had the duty to exercise reasonable care under the circumstances to protect a longshoreman from injury. This was in accord with the admiralty concept of "negligence" found in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). In those cases, verdicts for plaintiffs were upheld. In both *Santos* and *Bachtel*, [numbers 79-512 and 79-538 on petitions for certiorari] the questions presented are identical, and in direct conflict with the decision below here.

Attempts by courts, both at the trial and appeal level, to define responsibility as "primary" on the stevedore have resulted in a sharp conflict in the circuits over

what the standard of care is. The Supreme Court should grant the writ in this important case because the Congress intended the courts to develop a uniform federal body of admiralty negligence law consistent with its intent to eradicate the unseaworthiness doctrine in longshoremen's cases.

The Seventh Circuit unequivocally held ". . . the behavior of the Stevedore belies any possible inference that the ship's crew was negligent." [p. 10a]. How such a result is possible where there was undisputed evidence that the crew had opened the deep tank into which plaintiff fell, and it was clear that the crew did not rig the safety line around the tank awaiting to be worked that night, flies in the face of *any* reasonable standard to be applied in a longshoreman's negligence action, whether under the standards of §§ 343 and 343A of the Restatement of the Law, Torts II, or under the reasonable care under the circumstances standard adopted by the Ninth Circuit in *Santos* and *Bachtel*, or the pre-1972 negligence standard of *Kermarec*.

This misconception in the Seventh Circuit, and in others, has created a plethora of litigation and irreconcilable decisions throughout the various circuits, and the time is propitious that the Supreme Court settle the law to avoid further confusion.

Shortly after the court of appeals' decision in this matter, this Court rendered its decision in *Edmonds v. Compagnie Generale Transatlantique*, ... U.S. ....., 99 S. Ct. 2753 (1979), where it was held that, under 33 U. S. C. § 905(b), a "longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore . . . is partly to blame." ..... U.S. at ....., 99 S. Ct. at 2758. This Court further indicated that

damages were to be assessed without regard to any benefits plaintiff may have received under the Longshoremen's and Harbor Workers' Compensation Act. ..... U.S. at ....., 99 S. Ct. at 2761.

Although, of course, the Seventh Circuit cannot be charged with clairvoyance in predicting the ultimate decision in *Edmonds*, its decision and its view of the evidence are inconsistent with *Edmonds*. The court below charged Petitioner's employer with negligence in failing to rig a safety line. However, the record reveals that there was an industry-wide custom placing responsibility for rigging safety lines on those persons who opened the tanks. Here, it is undisputed that the ship's crew actually opened the tanks. Thus, the duty to rig such lines was on the vessel and the failure to do so would, as the jury found, constitute negligence. Under *Edmonds*, this "concurrent" negligence would not defeat Petitioner's recovery. Similarly, the rule in other circuits has been that liability will be imposed on the vessel where, as here, the evidence establishes that the vessel's crew actively participated in creating the condition which caused the injuries complained of. *See Lubrano v. Royal Netherlands Steamship Co.*, 572 F.2d 364 (2d Cir. 1978); *Butler v. O/Y Finnlines, Ltd.*, 537 F.2d 1205 (4th Cir. 1976). *Lopez v. A/S D/S Svendborg*, 581 F.2d 319 (2d Cir. 1978), *Napoli v. Hellenic Lines*, 536 F.2d 505 (2d Cir. 1976).

Yet the court of appeals found that Respondent had no knowledge of the custom in question, referring to it as a local, Port of Chicago custom. This, it is respectfully submitted, is not borne out by the record and affords an additional reason why certiorari should be granted. The first time any reference was made by Respondents to the fact that the custom testified to at trial was a local

custom was on appeal. No issue or argument was made at trial by defendant-respondent that the custom was anything other than an industry-wide custom. Under the circumstances, the court of appeals had no jurisdiction to decide this question. As stated in *McCandless v. Furland*, 293 U.S. 67, 74 (1934), a defect found in the record should not defeat recovery where it could have been objected to at trial. Accord, *United States v. Atkinson*, 297 U.S. 157, 159 (1936).

Thus, the court below failed to recognize one of the basic tenets of appellate review, that the reviewing court is to be concerned only with the record as it existed for the trial court. *See, e.g., In re Stolkin*, 471 F.2d 1331 (7th Cir. 1973).

The trial record is simply devoid of any evidence which can reasonably be interpreted as limiting the custom of rigging safety lines to the Port of Chicago. Merely because there is no O.S.H.A. regulation covering this point does not militate against it. Indeed, the O.S.H.A. regulations themselves, 29 C.F.R. § 1918.2(b), reproduced in full, *supra*, clearly indicate that vessel owners are not to be relieved of responsibility placed upon them by custom. This is made clear by the decision of the Ninth Circuit Court of Appeals in *Bachtel v. Mammouth Bulk Carriers, Ltd.*, ... F.2d ..... (9th Cir. August 20, 1979) Cases such as *Chavis v. Finnlines, Ltd. O/Y*, 576 F.2d 1072 (4th Cir. 1978), and *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977), relied upon by the court below do not represent the proper interpretation of the O.S.H.A. regulations as they affect a vessel owner's liability to a longshoreman. And, it will also be noted that it was not the intent of Congress, in amending the Longshoremen's and Harbor Workers' Act, to have different standards apply in

different ports. See H.R. Rep. No. 92-1441, 3 [1972] *U.S. Code Cong. & Ad. News* 4698, 4705.

This Court has never considered the effect of custom on a vessel's liability under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905. Nor has this Court ever considered the scope and meaning of 29 C.F.R. § 1918.2(b). These are important and undoubtedly recurring questions which will shape the future course of litigation under the Act and must be decided by this Court to ensure the uniformity of decisions contemplated by the Congress when it passed the amendments to the Act in 1972. Further, an important question concerning the scope of review is presented by reason of the fact that the court below considered matters not raised, argued or objected to at the trial of this cause.

Cases such as *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir. 1978), *Cox v. Flota Mercante Grancolombiana*, 577 F.2d 798 (2d Cir. 1978), *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3rd Cir. 1977), and *Chavis v. Finnlines, Ltd.*,* *supra*, are all clearly distinguishable on their facts, because in each of those

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* In *Chavis v. Finnlines, Ltd.*, the court of appeals searched the record to affirm a jury's verdict for defendant, and rightly so, for, there, there was seriously conflicting evidence whether the plaintiff even injured his back at all on the ship. The *Clemons* court adopted the statement in *Chavis* that "the primary responsibility for the safety of the longshoremen is on the stevedore" is yet a quotation from *another* case, *Brown v. Rederi*, 545 F.2d 854 (3rd Cir. 1976). Nowhere in the House or Senate Reports of the LHWCA can such a categorical statement be found. It is legally misleading, and has been adopted by some courts to justify a conclusion. However, even *Chavis* recognizes "it does not appear, in all cases, the obligation is exclusively his [the stevedore's]." at p. 1078. The Seventh Circuit panel failed to make this distinction in the present case, or overlooked the point completely.

cases the condition causing the plaintiff's injuries was unknown or unexplained [e.g. *Cox*] or was created by the stevedoring company during longshoring operations [e.g. *Chavis* and *Hurst*]. This is not the situation in the case sub judice, as there was substantial evidence at trial that the vessel had created the condition which injured the plaintiff. Whether a given practice of an industry is negligent is to be determined by a jury, and not by the industry which practices it. *Rodriguez v. Compass Shipping Co., Ltd.*, 456 F. Supp. 1014 (2d Cir. 1978).

It is obvious that the panel of the Seventh Circuit believed the stevedoring company was responsible for the plaintiff's safety, even though the vessel was negligent in preparing the tanks for operations. This is also contrary to the rule in *Gallardo v. Westfal-Larsen & Co.*, 435 F. Supp. 484 (9th Cir. 1978). The jury resolved any disputed questions in favor of plaintiff, and the reversal by the Court of Appeals conflicted with the Seventh Amendment by their action. *Gallick v. Baltimore & Ohio Ry. Co.*, 372 U.S. 108 (1962), *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364.

RELATED CASES

The questions raised in this case are related to those raised in the following pending petitions for writ of certiorari:

Scindia Steam Navigation Co. v. Santos, No. 79-512;

Mammouth Bulk Carriers, Ltd. v. Bachtel, No. 79-538; and

Ernst Russ Steamship Company v. John Matthews, No. 79-624.

CONCLUSION

Petitioner asks that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the decision of the court.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1812

BOOKER CLEMONS,

Plaintiff-Appellee,

v.

MITSUI O.S.K. LINES, LTD. and
BABA-DAIKO SHOSEN, K.K.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 76-C-4639—**Stanley J. Roszkowski**, *Judge.*

HEARD JANUARY 24, 1979—DECIDED APRIL 16, 1979

Before CUMMINGS, *Circuit Judge*, MARKEY, *Judge*,* and TONE, *Circuit Judge.*

PER CURIAM. In this suit for recovery of damages for personal injury, the amended complaint was, as plaintiff puts it, "concurrently based upon diversity of citizenship [28 U.S.C. § 1332] and * * * cognizable in admiralty [28

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* Honorable Howard Thomas Markey, Chief Judge of the U.S. Court of Customs and Patent Appeals, is sitting by designation.

U.S.C. § 1333]."[1] Plaintiff sought $250,000 from the owners of M/V MAYASAN MARU and from co-defendant Baba-Daiko Shosen, K.K., the charterer of the vessel. The amended complaint showed that plaintiff was employed as a longshoreman by Transoceanic Terminals Corporation ("Stevedore"), a stevedoring company, to unload cargo from the M/V MAYASAN MARU in Chicago, Illinois, when he stepped backwards "over an open hatch, causing him to plummet approximately eighteen (18) feet below into a tank." His ensuing injuries were said to have been caused by defendants' failure to provide a safety line or net about the hatch.

At the jury trial, the evidence showed that on November 23, 1976, plaintiff was performing stevedoring services aboard the MAYASAN MARU under contract between the Stevedore and the defendants. He was 66 years old, largely retired, and had 14 years' experience in his trade. He was assigned to work in Hatch No. 4 containing four deep tanks. The aft pair consisted of tanks A and D; the forward pair were designated B and C. Each pair had a common cover and was about 20′ deep and 20′ wide. He was directed to work in tank A. During the afternoon of November 23, he and his fellow longshoremen were discharging bales of wire from that tank and tank D, the other aft tank. This work had not been finished when they stopped for supper at 6:00 PM. They were to return to work at 7:00 PM.

About 4:30 PM that afternoon, a supervisory employee of the Stevedore, identified only as "George," told foreman Albert Johnson, also an employee of the Stevedore, that the longshoremen would load empty tanks B and C after supper and therefore to have the

[1] Plaintiff's brief 2. However, again according to plaintiff's counsel, the case was tried solely on the theory of defendants' negligence; no concept of unseaworthiness was presented to the jury (Br. 6). The vessel's liability to longshoremen on account of unseaworthy conditions was specifically eliminated by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 905(b).

crew open them before then. Consequently, Johnson told a member of the ship's crew to open those tanks between 6:00 PM and 7:00 PM and he did so. A few minutes after 7:00 PM, on returning from his supper break, plaintiff fell backwards into tank C while on his way back to his station in tank A. On his way to tank A, plaintiff had decided to peek into its companion aft tank D to see how the longshoremen who had returned to work ahead of him were doing. Plaintiff testified that thereafter:

> "When I straightened up from peeping in D, I stepped backwards. From looking over here, I must have stepped over a little too far. I stepped right over here in C, this open hole right here * * *." (App. 120.)

At 7:35 PM, the Stevedore employee named George decided that tanks B and C should not be loaded until the following morning. Until then, the ship's crew had still expected tanks B and C to be worked that evening.

After remaining unconscious at the bottom of tank C, plaintiff climbed three sets of ladders to the deck of the ship and reported the incident to Johnson. Plaintiff was then hospitalized for ten days at South Shore Community Hospital where he was diagnosed as having "[m]ild cerebral concussion; superficial laceration of the scalp; contusion, right knee and foot; acute cervical strain; degenerative disease of the thorocolumbar spine and both knees" (Plaintiff's Exhibit 3). His medical expenses totaled approximately $4,000 (Plaintiff's Exhibit 1).

The jury found that plaintiff's contributory negligence was 13% responsible for his fall but entered a verdict of $322,000 for him, and the trial court entered judgment on the verdict for that sum less 13%. Defendants filed a motion for judgment n.o.v. or, in the alternative, for a new trial. After considering defendants' post-trial briefs, the motions were denied, resulting in the filing of this appeal. We reverse on the ground that the motion for judgment notwithstanding the verdict should have been granted.

It is true that a court should sparingly enter judgments n.o.v. As Judge Hastings pointed out in *Hohmann v. Packard Instrument Company, Inc.*, 471 F.2d 815, 819 (7th Cir. 1973), a motion for judgment notwithstanding the verdict or for a directed verdict "should be denied where the evidence, along with the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions" (citations omitted). In the present case, we firmly conclude that the evidence is of insufficient probative value for jurors fairly and impartially to differ as to the inferences to be reasonably drawn on the question of whether in the context of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, any negligence could be attributed to these defendants. Consequently, it was error to deny the judgment n.o.v. Wright and Miller, *Federal Practice and Procedure* § 2524; 5A Moore's *Federal Practice* ¶ 50.02[1].

Under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972 (33 U.S.C. §§ 901, *et seq.*), Congress placed a longshoreman injured on board a vessel in the same general position as if injured in non-maritime employment ashore, concluding that the major responsibility for the proper and safe conduct of the work is to be borne by the Stevedore, from whom this plaintiff apparently has already recovered workmen's compensation under the Act. Responsibility for the longshoremen's safety was focused on those best able to improve it, the stevedores.[2]

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[2] The Occupational and Safety Health Administration (OSHA) regulations establish the standard of care to which the stevedores are held responsible. Although these regulations require numerous specific safety measures, they do not impose even on the Stevedore the duty of running lines between open deep tanks. See 29 C.F.R. §§ 1918.31(e) and 1918.35. If plaintiff had proved that his accident occurred from poor lighting on the ship, the OSHA regulations would place that responsibility on the Stevedore rather than the shipowners. 29 C.F.R. §§ 1918.2 and 1918.92.

Although the shipowner retains the legal duty to exercise ordinary care to keep the premises in a condition reasonably safe for use by the longshoremen, negligence of the shipowners must now be based on negligence principles applicable to land-based activities in non-maritime pursuits. *Chavis v. Finnlines, Ltd.*, 576 F.2d 1072 (4th Cir. 1978). As a result of the amendments to the Act, a vessel owner is to be judged by the same standard of care as a land owner to a business invitee, such as embodied in Sections 343 and 343A of the Restatement of Torts (2d) (1965).[3]

The 1972 amendments substantially increased the benefits payable under workmen's compensation secured by the longshoreman's employer[4] but made the shipowner liable only for negligence attributable to the vessel, rather than—as had previously been the case—for any unseaworthy condition. The amendments also eliminated the shipowner's third-party action against the longshoreman's employer, in the event the shipowner is held liable for negligence.[5] The House Report accompanying the 1972 amendments makes clear that whether the vessel was negligent is to be determined primarily by established principles of land-based tort law,[6] that the primary responsibility for the safety of the longshoremen rests with the employer,[7] and that the shipowner is not to be held liable for the negligence of

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[3] *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976), and *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976).

[4] The employer is usually a stevedoring company or a shipyard.

[5] For detailed explanations of the development of the law in this area and the difficulties that gave rise to the new compromise reflected in the 1972 amendments, see *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1242-1244 (3d Cir. 1977); *Gay v. Ocean Transport & Trading, Ltd., supra*, 1235-1236.

[6] H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in 3 [1972] U.S. Code Cong. & Ad. News 4698, 4703.

[7] *Id.* at 4699.

the employer.[8] The five Circuits that have considered the question of what standard determines the shipowner's liability under the 1972 amendments have agreed that the shipowner will not be liable if the employer knew (or should have known) of the dangerous condition and nevertheless continued working the longshoremen unless the shipowner knew of special circumstances which would compel the longshoremen to continue to encounter an open and obvious danger which the shipowner was (or should have been) aware of and could have alleviated. *Cox v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 798 (2d Cir. 1978);[9] *Hurst v. Triad Shipping Co., supra*;[10] *Chavis v. Finnlines, Ltd., supra*, and *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir.

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[8] *Id.* at 4703, 4704. The non-liability of the shipowner for the employer's negligence is made explicit in the statute. 33 U.S.C. § 905(b).

[9] The jury verdict for the plaintiff was reversed on appeal because the responsibility for seeing that hatch covers were locked in place was the employer's, although it was the job of the vessel's crew to execute the task and it had been asked to do so. Earlier Second Circuit cases holding the shipowner liable are distinguishable on the ground that the ship's officer affirmatively participated in the decision that the longshoremen should continue working despite his knowledge of the dangerous condition (*Lubrano v. Royal Netherlands Steamship Co.*, 572 F.2d 364 (2d Cir. 1978)) or that the vessel operated as its own stevedore, and therefore was the plaintiff's employer (*Napoli v. Hellenic Lines, supra*).

However, in the most recent Second Circuit case of *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682 (2d Cir. 1978), another panel disagreed with the approach taken in *Cox, supra*, and held the shipowner liable for the negligent act of the vessel's crew even though the employer had responsibility for maintaining safe conditions. Judge Friendly wrote a strong dissent. While it is not clear which approach should properly be attributed to the Second Circuit, in the present case the result would be the same regardless of whether the *Cox* or *Canizzo* standard applied because, as explained *infra*, there was no evidence from which the jury could have properly concluded that the vessel's crew was negligent.

[10] A directed verdict for defendant was affirmed because there was no evidence to rebut the shipowner's denial of knowledge of the dangerous condition.

1977);[11] *Gay v. Ocean Transport & Trading, Ltd., supra;*[12] *Westcott v. Impresas Armadoras, S.A. Panama,* 564 F.2d 875 (9th Cir. 1977).[13] We agree with the approach taken in those cases and conclude that on the facts of the present case, the plaintiff cannot recover.

Here both the plaintiff and his employer knew that B and C tanks were open and unguarded. After plaintiff reported his fall,[14] his foreman testified that he could see that tank C was open and unguarded when he looked down from the upper deck into the lower hold.[15] Under earlier tort law principles, the fact that the open condition should have been apparent to plaintiff would have precluded his recovery, but the Restatement of Torts creates an exception where the possessor of land (here the possessor of the ship) "should anticipate the harm

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[11] Jury verdicts for defendants were upheld on appeal and instructions were approved that stated (1) the shipowner is liable only for hidden dangers which were unknown to the employer in the exercise of ordinary care or (2) the shipowner is not liable for open and obvious dangerous conditions if the employer could have been expected to correct them.

[12] Judgment for defendant shipowner in bench trial was affirmed when the hazard was readily apparent to the employer, even though the shipowner also knew of the danger.

[13] Judgment was ordered for defendant shipowner notwithstanding the jury verdict for plaintiff when the operations were within the employer's control and the shipowner was not aware of the danger.

[14] Although he testified that he stepped backwards into tank C, plaintiff told Johnson he had missed a step on a ladder (App. 192).

[15] Johnson testified that this was the first time he became aware that B and C tanks were open. However, since Johnson at his supervisor's direction had instructed the ship's crew to open those tanks during the supper hour, he and George, his supervisor, must have expected that the crew had followed his directions. Since he had also told the vessel's duty officer that the tanks were to be loaded after supper, Johnson must have expected that no safety line would be rigged because by his own testimony this would not be done if the tanks were to be worked. He did not instruct the vessel's crew to rig a safety line around these tanks either before or after plaintiff's fall.

despite a known or obvious dangerous condition." *Napoli v. Hellenic Lines, Ltd., supra* at 508; Restatement of Torts (2d) § 343A; Prosser, *The Law of Torts* § 61 (4th ed. 1971).[16] Here there was no evidence that defendants should have anticipated that plaintiff, a longtime longshoreman, would be unable to avoid falling backwards into tank C. Since an open tank is a condition routinely encountered by longshoremen, there was no reason to anticipate that anyone would be harmed by it. Therefore the exception in Section 343A is inapplicable.[17] *Stanley v. United States*, 476 F.2d 606, 609 n. 5 (1st Cir. 1973). As in *Stanley*, there is no evidence that defendants should have supposed that the Stevedore would employ careless workers on this job or fail in its obligations to take any needed safety precautions. Therefore, the *Stanley* court, with which we agree, refused to apply the exception embodied in Section 343A.

In addition, in the present case the Stevedore was responsible for the hazard both because it requested the

[16] *Arguendo* we are assuming that the exception in Section 343A is the proper standard, but we do not decide that question. The Circuits are divided on the question of whether Section 343A applies when the dangerous condition was either created by or known to the employer. Compare *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977), and *Canizzo v. Farrell Lines*, 579 F.2d 682 (2d Cir. 1978), with *Cox v. Flora Mercante Grancolombiana*, 577 F.2d 798 (2d Cir. 1978); *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir. 1977); *Chavis v. Finnlines, Ltd.*, 576 F.2d 1072 (4th Cir. 1978); and *Westcott v. Impresas Armadoras, S.A. Panama*, 564 F.2d 875 (9th Cir. 1977).

[17] Plaintiff suggests that application of the Restatement of Torts doctrine is tantamount to raising the defenses of contributory negligence or assumption of the risk, and that these defenses are contrary to the intention expressed in the House Report that the maritime concept of comparative fault is to be applied (H. R. Rep. No. 92-1441, *supra*, at 4705). However, we read Section 343 together with Section 343A not as providing defenses but as defining when it is negligent to allow the existence of a dangerous condition. Under the Restatement, when the danger is open and obvious and in addition is avoidable in the exercise of ordinary care and therefore the harm is not foreseeable, it is not negligent to allow the danger to exist.

tanks to be opened and because, knowing they were open, it was charged by the Act with seeing to the safety of the longshoremen. After 4:30 PM, the Stevedore instructed the ship's crew to open tanks B and C between 6:00 and 7:00 PM because the longshoremen would be working there after their 7:00 PM return from supper. The undisputed evidence showed that, as plaintiff himself testified, in accord with the usual industry practice, no safety line would be placed around tanks being worked (App. 154). As the Stevedore's General Manager Paul Lopes testified, such a line would create a hazard to the longshoremen who would have to go under it (App. 332).

Plaintiff relies on a Chicago port custom that a safety line should be erected around an open deep tank. There is no evidence that this custom was known to defendants.[18] Moreover, the uncontroverted evidence is that this custom applies only to tanks in which no one is to be working. When this accident occurred a few minutes after 7:00 PM, tank C was to be worked that evening. It was not until 7:35 PM that the Stevedore employee named George countermanded his previous order. Indeed the only reason foreman Johnson had ordered the ship's crew to open tank C was to enable it to be worked that evening. Johnson's testimony evidenced what the ship's crew was told and what the custom of stringing safety lines consisted of. He said that he told the ship's duty officer to open the B and C tanks during the supper break because the longshoremen would be working there when they returned (App. 186, 200). By Johnson's own unequivocal testimony, the custom was that no safety lines should be rigged when the longshoremen were working a tank (App. 201), so that if the crew believed the men would be working B and C tanks, the crew would not be expected to rig a line. Johnson consistently testified that if open tanks were not to be worked for some time, a

[18] The deposition testimony of officer Aoshima does not acknowledge the custom described by Johnson. Mr. Aoshima, speaking through an interpreter, merely stated that he believed that all appropriate safety precautions had been taken (App. 227).

safety line would be rigged (App. 201). There was no evidence that the defendants were aware of or should have been aware of the local custom, nor was there evidence that in the circumstances the failure to rig a line was a departure from the alleged custom.

Additionally, the behavior of the Stevedore belies any possible inference that the ship's crew was negligent. The majority of the longshoremen who were working in the same hatch as plaintiff had returned to work before him, without complaint of the failure to rig lines around the open tanks. The Stevedore, statutorily charged with the primary responsibility for its employees, did not ask the ship's crew to rig a safety line at the time it requested tanks B and C to be opened or after plaintiff's accident. The longshoremen continued to work with all four tanks open and no safety lines around them during the evening after plaintiff's fall and throughout the following day (App. 33). Therefore, the evidence was insufficient to support a verdict for the plaintiff. Even if the absence of a safety line in these circumstances could be considered negligent, the negligence was not shown to be, in the context of the Act, chargeable to the defendants rather than to the Stevedore.

As seen (notes 9-13 *supra*), the pertinent case law is in accord with the undisputed evidence in this case. In addition, *Long v. Silver Lines, Ltd.*, 48 F.2d 15 (2d Cir. 1931); *Miller v. The Sultana*, 176 F.2d 203 (2d Cir. 1949); *Ove Tysko v. Royal Mail Steam Packet Company*, 81 F.2d 860 (9th Cir. 1936), specifically hold that it is not negligent for a hatch to be left open in anticipation of the commencement of cargo work. The authority of these cases has remained undiminished. In fact, plaintiff admits that general maritime law is pertinent and that cases decided on the basis of standards of maritime negligence prior to the 1972 amendments to the Longshoremen's Compensation Act are still viable precedents (Br. 10). In view of our holding that a reasonable jury could not find that this accident was caused by defendants' negligence, it is unnecessary for us to consider other errors claimed by defendants.

The judgment is reversed with directions to enter a new judgment in favor of defendants.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

PER CURIAM OPINION

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

April 16, 1979

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HOWARD T. MARKEY, *Judge**
Hon. PHILIP W. TONE, *Circuit Judge*

BOOKER CLEMONS,

Plaintiff-Appellee,

No. 78-1812 vs.

MITSUI O.S.K. LINES, LTD. and
BABA-DAIKO SHOSEN, K.K.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-4639 — STANLEY J. ROSZKOWSKI, *Judge*.

ORDER

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, WITH DIRECTIONS, in accordance with the opinion of this court filed this date.

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* Honorable Howard T. Markey, Chief Judge of the U.S. Court of Customs and Patent Appeals, is sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

July 3, 1979

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HOWARD T. MARKEY, *Judge**
Hon. PHILIP W. TONE, *Circuit Judge*

BOOKER CLEMONS,

Plaintiff-Appellee,

No. 78-1812 vs.

MITSUI O.S.K. LINES, LTD. and
BABA-DAIKO SHOSEN, K.K.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-4639 — STANLEY J. ROSZKOWSKI, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee Booker Clemons, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Honorable Howard T. Markey, Chief Judge of the U.S. Court of Customs and Patent Appeals, is sitting by designation.

MAY 19
MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-706

ARBRY McCULLEY, Administrator of the Estate of Booker Clemons, Deceased,

Petitioner,

vs.

MITSUI O.S.K. LINES, LTD. and BABA-DAIKO SHOSEN, K.K.,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Since the decision of the United States Court of Appeals for the First Circuit in *Johnson* v. *A/S Ivarans Rederi*, 613 F.2d 334 (1980), the conflict in the circuits regarding the standard of care in an action under the LHWCA has become more acute. The First Circuit has sharply disagreed

with the Seventh Circuit in the case sub judice and has flatly stated that the panel of the Seventh Circuit outright misapplied one of the very decisions passed down by the First Circuit and relied upon by a panel of the Seventh Circuit in reaching the conclusion that the Seventh Circuit did. A panel of the Seventh Circuit reversed a jury's verdict on special interrogatories finding, inter alia, that the vessel's negligence was the proximate cause of the plaintiff's injuries. [Tr. pp. 688-689] The Seventh Circuit, in so doing, stated at least four times, in various ways, in its opinion that, based on the facts in *Clemons*, "we firmly conclude that the evidence is of insufficient probative value for jurors fairly and impartially to differ as to the inferences to be reasonably drawn on the question of whether in the context of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, any negligence could be attributed to these defendants." *Clemons*, 596 F.2d at 748.

The case of *Clemons* at bar is very similar to *Johnson* recently decided by the First Circuit. In both cases the jury was instructed in accordance with the basic concepts of §§343 and 343A of the Restatement of the Law, Torts II. [*Johnson*, at p. 350; *Clemons*, Tr. pp. 664-665]. However, the First Circuit was of the opinion that, to the extent the standard was not one of "reasonable care under the circumstances" which it concluded should be the appropriate standard, the instruction was erroneous; but, since the jury found liability on a standard which is more favorable to the vessel owner, the district court's error was harmless. For, if the jury found the vessel solely negligent under the standard of §§343 and 343A, it would have found the vessel solely negligent under the "reasonable care under the circumstances" standard. See, *Johnson*, at p. 350.

Since *Johnson* involved a longshoreman falling into an open unguarded hatch, the vessel owners cited *Clemons* as authority that no liability should attach. The First Circuit not only disagreed with *Clemons*, but it criticized it. *Johnson* pointed out that *Clemons* purported to rely on the First Circuit's decision in *Stanley* v. *United States*, 476 F.2d 606 (1973) that the §343A exception does not apply because there was no evidence in *Clemons* that the stevedore would employ careless workers or fail to take necessary safety precautions. [*Clemons* at p. 750]. The *Johnson* court said "[t]his is an excellent example of the pitfalls inherent in the use of §343A in §905(b) cases." In *Stanley*, Maine law was applied in reversing a jury verdict. The First Circuit noted that the "burden of establishing the exception should be substantial. Otherwise, since whenever a party has been injured the warning has in fact been ineffective, there will be a danger of the exception being found to swallow up the rule. This rule, *which we believe applies only on land*, imposes a heavy burden on the plaintiff." The court continued:

> "The plaintiff must prove that the defendant should have known the plaintiff could not competently assume the risk associated with the known danger or would be negligent in dealing with the danger. Underlying this burden is the assumption that a landowner may allow the existence of an unreasonably dangerous condition on his land and may contract with persons for them to work around those dangers without incurring any liability, on the grounds that the contractors assumed the risk of working around those known dangers. The landowner would be liable only if it failed to warn the workers of latent conditions or if it oppressed them, such as by allowing them to work when the landowners knew or should have known the workers could not possibly avoid the danger.

> While this may be a *terrene rule* of this court, the dictates of §905(b) would prohibit the creation of a second and similar rule for application upon navigable waters. By enacting §905(b), Congress sought to focus attention on the amelioration of dangerous conditions on board ship. The rule in *Stanley*, as lowered into the ship by *Clemons*, focuses on the accuracy of the longshoreman's perception that he can avoid the danger. Once the stevedore and/or the longshoreman makes that decision under *Clemons*, the issue of the vessel's lack of care in allowing the condition to exist evaporates. There would be no balancing of the usefulness of the dangerous condition and the burden involved in curing it against the risk to others of its continued existence. The effect of this rule, *contrary to the intent of Congress*, is to allow the vessel to be protected from its negligence." [*Johnson*, fn. 12]

The First Circuit then went on to illustrate the various cases in which courts have treated longshoremen falling into open unguarded hatches. After a careful analysis and a consideration of the *Johnson* opinion, it is obvious that the panel of the Seventh Circuit was clearly wrong for turning over the jury's finding for the plaintiff for many reasons:

> (1) *Stanley* v. *United States* is distinguishable on its facts. There, a boy of 20 years of age, his second day on the job, fell from a tower into an open manhole, in daylight. The court held there was no evidence the defendant should have supposed the independent contractor would have hired careless and inexperienced workers. *Johnson* has now clearly stated that it never intended its decision to apply in a maritime context.
>
> (2) *Miller* v. *The Sultana*, 176 F.2d 203, *Long* v. *The Silver Line, Ltd.*, 48 F.2d 15 are also clearly distinguishable on their facts. *Miller* involved a fall into an open unguarded hatch on the upper deck of a ship in broad daylight, whereas *Clemons* conditions were

in the dark in the lower hold of the ship, where the condition was not as "open and obvious". The panel of the Seventh Circuit without making a balanced inquiry into the reasonableness of the circumstances stated: "As seen . . . *Long* v. *Silver Line; Miller* v. *The Sultana; Ove Tysko* v. *Royal Mail Steam Packet Company* specifically hold that it is not negligent for a hatch to be left open in anticipation of the commencement of cargo work. The authority of these cases has remained undiminished. In fact, plaintiff admits that general maritime law is pertinent and that cases decided on the basis of standards prior to 1972 amendments to the LHWCA are still viable precedents." [*Clemons,* p. 751]. Such rigid application of past decisions fails to take into account the direction of Congress in enacting the 1972 amendments that "there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties." [*Johnson,* p. 339].

Yet, despite this mandate from Congress, the Seventh Circuit panel completely disregarded the special verdict of the jury and held that "the behavior of the stevedore belies any possible inference that the ship's crew was negligent . . . The stevedore statutorily charged with the primary responsibility for the safety of its employees, did not ask the crew to rig a safety line at the time it requested the tanks B and C to be opened. . . ." There is nowhere to be found in "the statute" the categorical statement that the stevedore is charged with the primary responsibility for the safety of its employees.

The Seventh Circuit panel further shows its total rigidity in understanding LHWCA cases in *Clemons,* footnote 2,

when it outright states that "[if] plaintiff had proved that his accident had been caused by poor lighting on the ship, the OSHA regulations would place that responsibility on the Stevedore rather than the shipowners. 29 C.F.R. §§1918.2 and 1918.92." This rigidity is further amplified by the panel's paraphrasing that "Congress concluded that the major responsibility for the proper and safe conduct of the work to be done is to be borne by the Stevedore, from whom this plaintiff has already recovered workmen's compensation under the Act." *Clemons,* p. 748. With an approach like this, few longshoremen would have a chance of recovering in the Seventh Circuit.

As in *Clemons,* the *Johnson* court was asked to rule whether the district judge erred in denying the motions of the vessel owner for judgment n.o.v. or, in the alternative, for a new trial. [*Johnson,* p. 351; *Clemons,* p. 748]. Clemons' lawyer, in his petition for certiorari urges affirmance is necessary if the jury's answers to the special interrogatories are consistent and that the Court of Appeals would be violating the Seventh Amendment to the Constitution of the United States if, in reviewing the jury's special interrogatories, it reversed, if under any view of the case the interrogatories are, or can be made, consistent. *Atlantic & Gulf Stevedores* v. *Ellerman,* 369 U.S. 355 (1962). In *Johnson,* the court found the jury could reasonably have found that the hatch covers were left open by a crew under the control of the ship; that the hatch was left unguarded and the hatch left unlighted; that the vessel was reminded of this condition prior to the commencement of the work by the signalman and that the vessel should reasonably have expected longshoremen working in adjacent hatches to enter the No. 3 hatch and fall into the opening in the 'tween deck created by the opened hatch covers. [*Johnson,* p. 351]

On essentially the same facts, the panel of the Seventh Circuit came to the opposite conclusion and reversed the jury's verdict of negligence on the part of the vessel on five special interrogatories [Tr. pp. 688-689]. In the *Atlantic & Gulf Stevedores* case, *supra,* the Supreme Court said "neither we nor the court of appeals can redetermine facts found by the jury any more that the district court can predetermine them." [pp. 358-9]. For, in deciding the propriety, *vel non,* of the entry of a judgment n.o.v. or a directed verdict, the appellate court is constitutionally forbidden to reappraise the evidence, and, in the language of the Third Circuit, must solely decide whether, looking at the record coldly, it is so critically devoid of that minimum quantum of evidence from which a jury might reasonably afford relief. *Denneny* v. *Siegal,* 407 F.2d 433, and *Continental Ore Co., et al.* v. *Union Carbide Co., et al.,* 370 U.S. 690 (1961). Using that test, it is clear that *Clemons'* case should be heard by the Supreme Court to resolve the conflict, and reverse *Clemons,* as it is patently a bad decision and contains much misleading *obiter dictum* which has a way of persuading other courts to come to wrong conclusions, although *Clemons* has apparently not been cited by any other court in the nation, except in the order denying the Petition for Rehearing in *Santos* v. *The Scindia Navigation* Court, No. 79-512, to say that it was not being followed.

As in *Johnson,* the district court found, in *Clemons,* and it is urged in this Court, that the jury here could reasonably have found that the deep tanks in the lower hold in which plaintiff was to work were opened by a crew under the control of the vessel during the supper hour between 6:00 and 7:00 p.m. on November 23, 1976 [Tr. p. 200]; there was a custom in the maritime industry that when the crew opens the deep tanks it is customary to rig a

safety line or net around those tanks to avoid someone falling in, when the tanks are not actually being worked [Tr. pp. 175-177]; after the crew opened the tanks they put no safety line around the tanks, and that none was there when the longshoremen returned from supper to resume working in the *adjacent* deep tanks which they were working [Tr. pp. 199-201]; plaintiff fell into the deep tanks which were about 20 feet wide and 21 feet deep [Tr. pp. 113, 123]; the stevedore's foreman, Mr. Albert Johnson, informed the crew's duty officer that there was about 30-45 minutes more unloading to do in the adjacent deep tanks, *after supper,* to complete before the commencement of operations in the deep tanks opened which did not have the safety line rigged around it, and into which the plaintiff fell, clearly meaning that those tanks were *not* going to be worked immediately upon the longshoremen's return from supper at 7:00 p.m. [Tr. pp. 199-201].

On these facts, the jury found: (1) the defendant vessel owner was negligent; (2) that negligence was the proximate cause of the plaintiff's injuries and damage; (3) Clemons was contributorily negligent; (4) His negligence was 13% responsible for the occurrence; (5) His full damages were $322,000.00. The panel of the Seventh Circuit completely misunderstood the balance of the tripartite role of stevedore, vessel and longshoreman, and disregarded the fact that the stevedore can be concurrently negligent with the vessel owner, although that was never contended by the plaintiff. However, assuming, *arguendo,* that were the case the plaintiff could still recover the full amount of his damages from the vessel. *Edmonds* v. *Compagnie Generale Transatlantique,* ..... U.S. ....., 99 S.Ct. 2753 (1979). Even the *Edmonds* decision is clear that the Congressional intent in the 1972 Amendments shows nothing to change or

abrogate the rule that the previously applicable principles of negligence were to be changed or made stricter post 1972.

The panel of the Seventh Circuit has made a Draconian ruling in longshoremen's cases as evidenced in *Clemons*. It appears they have backed off a bit in their subsequent opinion of *Matthews* v. *Ernst Russ Steamship Company*, 603 F.2d 676 (7th Cir., 1979). In *Matthews*, the Seventh Circuit again refused to take a decisive position as to what the standard of care is in a §905(b) case, and sidestepped the issue by sanctioning a "reasonable care under the circumstances" standard, as approved in the recent case of *Santos* v. *Scindia Steam Navigation Company*, No. 79-512, see *Matthews*, p. 682. By observing the Seventh Circuit's comments in *Matthews* [p. 682] of its previous decision in *Clemons*, it is obvious that it disregarded the jury's special findings of fact, and reversed in conflict with the Seventh Amendment. In light of *A/S Ivarans Rederi* v. *Johnson*, Supreme Court Docket No. 79-1587, and the reported decision of the First Circuit, the conflict in decisions is more apparent than ever. Certiorari should be granted in *Clemons*.

Respectfully submitted,

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Supreme Court, U. S.
FILED
DEC 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-706

ARBRY McCULLEY, ADMINISTRATOR OF THE ESTATE OF BOOKER CLEMONS, DECEASED,

Petitioner,

vs.

MITSUI O. S. K. LINES, LTD. AND BABA-DAIKO SHOSEN, K. K.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

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TABLE OF AUTHORITIES CITED.

Cases. PAGE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

The respondents, Mitsui O. S. K. Lines, Ltd. and Baba-Daiko Shosen, K. K., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 596 F. 2d 746.

REASONS WHY THE WRIT SHOULD BE DENIED.

The thrust of petitioner's argument is that the court below wrongly concluded that there was insufficient evidence to permit a reasonable jury to find the vessel negligent. But, in an effort to persuade the Court that the importance of this case transcends its facts, petitioner has offered a potpourri of claimed legal issues that either do not arise on the record of this case, or are otherwise unworthy of the Court's attention.

I.

THE QUESTION OF A BAR TO PLAINTIFF'S RECOVERY DOES NOT ARISE ON THE RECORD OF THIS CASE.

With respect to the first "Question Presented," the Court of Appeals did not hold (or even intimate) that stevedore negligence should operate as a bar to a longshoreman's right of recovery under section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act. 33 U. S. C. § 905(b). The jury found that plaintiff's own negligence contributed 13% to his injury. The Court of Appeals concluded that defendants were not at fault at all, and merely stated that, if there had been any negligence associated with the hatch-opening operation, it would have been the stevedore's, and not the vessel's. Pet. 10a.

The forward tanks located in the No. 4 hold were opened by the ship's crew at the express direction of the stevedore's foreman hours after unloading operations had begun. The crew was not told to rig "safety lines," and did not do so. Nevertheless, plaintiff claimed, solely on the basis of an alleged custom whereby safety lines would be rigged by the ship's crew around open tanks in which no one was to be working, that the vessel's

failure to rig such lines constituted negligence.[1] However, because the crew was instructed to open the tanks so that the longshoremen could work in them on their return from dinner, the alleged custom, pertaining to tanks that were not to be worked, did not apply.[2] As further support for this conclusion, the Court of Appeals pointed out that neither before nor after plaintiff's accident had the stevedore asked the crew to rig safety lines, nor did the stevedore do so itself, although operations in the No. 4 lower hold continued that evening and throughout the following day. Pet. 10a. Consequently, the question of a bar to plaintiff's right of recovery against the ship never arose; on the facts of this case, there was simply no right of recovery to be barred.

II.

PETITIONER HAS POINTED TO NO EVIDENCE TO SUPPORT ITS CONTENTION THAT THIS CASE WAS WRONGLY DECIDED BY THE COURT BELOW.

The second "Question Presented" asks the Court to review the Court of Appeals' determination that there was insufficient evidence to permit a reasonable jury to find the defendants negligent. In its *per curiam* opinion, the court acknowledged the need for restraint in entering judgment N.O.V. Pet. 4a. Petitioner argued in his "Petition for Rehearing and Suggestion

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1. The absence of proof that the ship was or should have been aware of the claimed custom was pointed out by respondents in their briefs in the Court of Appeals, relying on *Miller* v. *The Sultana*, 176 F. 2d 203 (2d Cir. 1949). The court agreed (Pet. 10a), but the point was plainly not necessary to the result.

2. Although it probably makes no difference since stevedore operations in the No. 4 lower hold were going on continuously except for the dinner break, there was no evidence, contrary to petitioner's assertion at page 6 of the petition, that the custom required "ropes, guardrails or safety net around a deep tank if cargo was not actually being loaded or unloaded." All three witnesses who testified to the custom agreed that it applied only to tanks which were not to be worked. Trial Transcript 154, 200, 201, 319.

for Rehearing In Banc" that there was sufficient evidence to support the verdict, but no judge in active service requested a vote on the petition, and it was denied.

Petitioner points to no fact which suggests that the Court of Appeals did not reach the right result. Petitioner's argument that the vessel created the condition—i.e., an open hatch—that caused the plaintiff's injury (Pet. 14) would not imply liability even under the seaworthiness standard applicable prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946). Even under that standard, which was characterized by Justice Rutledge in *Sieracki* as "a species of liability without fault,"[3] an injured longshoreman had the burden of proving that the condition which caused his injury was one that made the vessel unseaworthy—i.e., unfit for its intended purpose. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 103 (1944). Clearly, an open cargo hatch about to be worked on a cargo ship is not such a condition.

III.

THERE IS NO CONFLICT BETWEEN THE HOLDING BELOW AND THE HOLDINGS OF THIS COURT, OR ANY OTHER COURT OF APPEALS.

A. There Is No Issue, on the Record of This Case, as to the Standard of Care Owed by Vessels to Longshoremen Under the 1972 Amendents.

Nothing in the opinion below conflicts with the decision in *Edmonds* v. *Compagnie General Transatlantique*, 99 S. Ct. 2753 (1979) *pet. for reh. den.*, 48 U. S. L. W. 3223 (October 2, 1979). Nor did *Edmonds* address the standard of care now applicable in third-party negligence actions brought under the 1972 amendments to the Longshoremen's and Harbor

3. 328 U. S. at 94, 95.

Workers' Compensation Act, 33 U. S. C. § 905(b). It may be, as petitioners suggest in *Santos*,[4] *Bachtel*,[5] and *Matthews*,[6] that this Court should examine the scope of the duty now owed by vessels to longshoremen to take affirmative action in respect of dangerous conditions arising during the course of stevedoring operations. However, that issue does not arise on the record of this case.

As petitioner points out, the case was submitted to the jury on an agreed standard of care instruction which was not disputed, by either side, on appeal. Pet. 9. *Tyrrell* v. *District of Columbia*, 243 U. S. 1 (1917). Moreover the result would have been the same in this case regardless of how the standard of care owed by vessels to longshoremen was described.

In *Santos* and *Bachtel*, the Ninth Circuit characterized the vessel's obligation as one of protecting longshoremen from "unreasonable risk of harm," tracing the lineage of that standard of care to *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 630-632 (1959). *Bachtel*, *supra* n. 5, at A-9. In this case, the Court of Appeals held that, on the facts, "an open tank is a condition routinely encountered by longshoremen," and that there was thus "no reason to anticipate that anyone would be harmed by it." Pet. 8a. The court buttressed its holding with authorities from the Second and Ninth Circuits decided under maritime negligence concepts that are virtually indistinguishable from this Court's analysis in *Kermarec*.[7] Pet. 10a. Indeed, "unreasonable risk of harm" cannot realistically be distinguished from the agreed standard applied in the court below. Since the court below held that the open tank did not pose an unreasonable risk of harm to longshoremen, there can

4. *Scindia Steam Navigation Co., Ltd.* v. *Santos*, No. 79-512.

5. *Mammoth Bulk Carriers, Ltd.* v. *Bachtel*, No. 79-538.

6. *Ernst Russ Steamship Co.* v. *Matthews*, No. 79-624.

7. *Long* v. *Silver Line, Ltd.*, 48 F. 2d 15 (2d Cir. 1931), *Miller* v. *The Sultana*, 176 F. 2d 203 (2d Cir. 1949), and *Ove Tysko* v. *Royal Mail Steam Packet Co.*, 81 F. 2d 960 (9th Cir. 1936).

be no conflict with *Santos* and *Bachtel*. Whatever differences there may be in *dicta* would not warrant review of this case on certiorari.

B. The Holding Below Was Consistent with Land-Based Principles of the Law of Negligence.

The holding in this case was consistent with the land-based principles of negligence the application of which is enjoined by the 1972 amendments. H. R. Rep. No. 92-1441, 92d Cong., Sess., *reprinted in* 3 [1972] U. S. Code Cong. & Adm. News 4698, 4703. "Negligence . . . necessarily involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger." Prosser, *Law of Torts* (4th Ed. 1971), at 250. Conversely, "there is no liability for harm resulting from conditions from which no unreasonable risk was to be anticipated. . . ." *Prosser, supra* at 393. The agreed standard of care applied in this case and in the other decisions cited by the court below (Pet. 6a, 7a), is consistent with these principles of the law of negligence. Sections 343 and 343A of the *Restatement* (Second) *of Torts* (1956), merely restate these principles in the context of one of the factual circumstances that may arise in a negligence claim—i.e., the open and obvious condition. Thus, if a dangerous condition on board ship is one that is obvious and routinely encountered by longshoremen in the performance of their duties, it is not reasonable to anticipate that harm will befall them as a result of it, and the condition is not unreasonably dangerous. If there is reason to anticipate harm notwithstanding the obviousness of the condition, the opposite result would obtain. *Cf., Prosser, supra*, at 394.

The court below concluded that there was no evidence to suggest that respondents should have anticipated that harm might befall a longshoreman from a condition—open deep tanks—routinely encountered in the course of their work. This

case was thus properly decided in accordance with a legal standard of care that is consistent with the intent of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.

CONCLUSION.

The petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1979

No. 79-706

ARBRY McCULLEY, Administrator of the Estate of Booker Clemons, Deceased,

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MITSUI O.S.K. LINES, LTD. and BABA-DAIKO SHOSEN, K.K.,

Respondents.

PETITIONER'S REPLY BRIEF

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Respondents.

PETITIONER'S REPLY BRIEF

Pursuant to rule 24 of the Supreme Court Rules, this reply brief of petitioner is filed.

I.

The Seventh Circuit wrongly decided this case because under any recognized standard of care, either pre-1972 or post-1972, the jury's verdict for the plaintiff was supported by the evidence, and should have been affirmed on appeal. To allow the opinion of the Seventh

Circuit to stand would be to tolerate an appellate court's upsetting jury verdicts when the issue of "open and obvious danger" is a question of fact, decided by the jury, and the court of appeals supplanting its conclusion for the jury's.

Here, the case was submitted to the jury on an agreed instruction consistent with negligence principles under the well-recognized exception to the open and obvious danger standard contained in § 343A of the Restatement of Torts, 2d. The jury resolved the question for the plaintiff in its verdict. The court of appeals redecided the case saying there was *no* negligence at all. This it cannot do. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, *Gallick v. Baltimore & Ohio Ry. Co.*, 372 U.S. 108.

II.

This decision is in direct conflict with the case of *Bachtel v. Mammouth Bulk Carriers, Ltd.*, [petition for certiorari filed, case No. 79-538]. Respondent's argument [Brief in Opposition, p. 5] that in *Bachtel* and *Santos* [79-512] the Ninth Circuit characterized the vessel's obligation as one of protecting longshoremen from unreasonable risk of harm begs the question in this case. The jury found from hearing all the evidence in the five-day trial that the respondent was negligent, but the panel of the Seventh Circuit did not include all the facts in its opinion and substituted its opinion for the jury's, notwithstanding the fact that the § 343A instruction to the jury contained a charge asking them to find and "determine whether the shipowner (a) knew or by the existence [sic] of ordinary care should have known of the condition, and should have realized that it involved an unreasonable risk of harm to longshoremen, and (b)

should have expected that the longshoremen would not discover or realize the danger, or would be able to avoid the danger, even though they may be aware of it, and (c) whether the shipowner failed to exercise ordinary care to protect them against the danger." [Tr. p. 665]

Under similar facts and circumstances, and a definition of negligence similar to that used in this case, the Ninth Circuit affirmed the jury's verdict that the vessel's negligence in failing to rig a safety line was the proximate cause of the plaintiff's injuries.

Respondent's citing *Long v. Silver Line, Ltd.*, *Miller v. The Sultana* and *Ove Tysko v. Royal Mail Steam Packet Co.* are no longer apropos of this case, as these were longshoremen cases decided at a time when the warranty of seaworthiness was available to a longshoreman currently with his negligence remedy. [Brief in opp., n. 7].

III.

Most importantly, as the Ninth Circuit pointed out in *Bachtel*, Title 29 C.F.R. § 1918.2 makes crystal clear that the OSHA regulations apply to "employers" and not to vessel owners, yet they *do not relieve owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.*

The Seventh Circuit, without checking the trial record carefully, obviously had in mind that the custom of rigging the safety net or rope or line around the open deep tank was peculiar to Chicago, when the trial record is devoid of such evidence, and in fact the contention was not even raised by respondent until its post-trial motion was filed.

Respondent's attorney failed to make any objection during the trial to petitioner's evidence that the custom was anything other than an industry-wide custom, used throughout the maritime industry. Federal Rule of Evidence 103(a)(1) could not be more specific that error may not be predicated upon a ruling unless "a timely objection or motion to strike appears *of record*, stating the specific ground of objection, if the specific ground was not apparent from the context." Respondent's failure to object constituted a waiver of any objection that the custom was anything except an industry-wide one, and not peculiar or unique to Chicago.

The panel reasoned that because there was no evidence that the crew knew of the custom, they could not be charged with negligence. Clearly, the Seventh Circuit, which had not heard a longshoreman's negligence case in about 10 years, until it heard this one, was confusing the law of custom in tort with that of contract.

Whether the crew knew of the custom would not make a difference, since proof of custom and usage is used in tort law to show standards of conduct, and the jury decides what constitutes negligence in a particular case.

CONCLUSION

The petition should be granted. Summary disposition is suggested in this case, by reversing the judgment of the Seventh Circuit at the same time as granting the writ.

Respectfully submitted,

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